



Legislative Bulletin.....September 8, 2008

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Summary of the Bills Under Consideration Today:

Total Number of New Government Programs: 0

Total Cost of Discretionary Authorizations: \$18 million in FY 2009 and \$124 million over the FY 2009 through FY 2013 period

Effect on Revenue: Increased negligibly

Total Change in Mandatory Spending: \$0

Total New State & Local Government Mandates: Multiple

Total New Private Sector Mandates: 0

Number of Bills Without Committee Reports: 5

Number of Reported Bills that Don't Cite Specific Clauses of Constitutional Authority: 0

S. 2403—A bill to designate the new Federal Courthouse, located in the 700 block of East Broad Street, Richmond, Virginia, as the “Spottswood W. Robinson III and Robert R. Merhige, Jr. Federal Courthouse”
(Warner, R-VA)

Order of Business: S. 2403 is scheduled for consideration on Monday, September 8, 2008, under a motion to suspend the rules and pass the bill.

Summary: S. 2403 would designate the new Federal Courthouse, located in the 700 block of East Broad Street, Richmond, Virginia, as the “Spottswood W. Robinson III and Robert R. Merhige, Jr. Federal Courthouse.”

Additional Information: According to the sponsor’s office:

Robinson was one of the key attorneys for the NAACP Legal Defense and Educational Fund from 1948 to 1960, achieving national acclaim with his representation of the Virginia plaintiffs in the 1954 landmark U.S. Supreme Court case *Brown v. Board of Education*. This decision declared “separate but equal schools” unconstitutional. After his work with the NAACP, Judge Robinson became the first African-American to be appointed to the U.S. District Court for the District of Columbia in 1964, eventually becoming a justice for the U.S. Court of Appeals for the District of Columbia Circuit in 1966, and later Chief Judge of the District of Columbia Circuit in 1981.

Further, Merhige was appointed Judge for the U.S. District Court for the Eastern District of Virginia where he served for 30 years. While on the federal bench, Merhige presided over important litigation, namely ordering the University of Virginia to admit women, and later ruling in favor of desegregation of a dozen Virginia school districts. His courage in the face of significant opposition is testament to his dedication to the rule of law.

Committee Action: S. 2403 was introduced on December 3, 2007, and passed the Senate by unanimous consent on June 24, 2008. On June 25, 2008, the bill was referred to the House Committee on Transportation and Infrastructure, which ordered the bill reported, as amended, by voice vote.

Cost to Taxpayers: A CBO score for S. 2403 is unavailable, but the only costs associated with a U.S. federal building renaming are those for sign and map changes, none of which significantly affect the federal budget.

Does the Bill Expand the Size and Scope of the Federal Government? No.

Does the Bill Contain Any New State-Government, Local-Government, or Private-Sector Mandates? No.

Does the Bill Comply with House Rules Regarding Earmarks/Limited Tax Benefits/Limited Tariff Benefits? A Committee Report citing compliance with rules regarding earmarks, limited tax benefits, or limited tariff benefits was not available. Such a report is not required because the bill is being considered under a suspension of the rules.

Constitutional Authority: Although no committee report citing constitutional authority is available, Article I, Section 8, Clause 7 of the Constitution grants Congress the authority to establish Post Offices and post roads.

RSC Staff Contact: Sarah Makin; sarah.makin@mail.house.gov; 202-226-0718.

S. 2837—A bill to designate the United States courthouse located at 225 Cadman Plaza East, Brooklyn, New York, as the “Theodore Roosevelt United States Courthouse” (Schumer, D-NY)

Order of Business: S. 2837 is scheduled for consideration on Monday, September 8, 2008, under a motion to suspend the rules and pass the bill.

Summary: S. 2837 would designate the United States courthouse located at 225 Cadman Plaza East, Brooklyn, New York, as the “Theodore Roosevelt United States Courthouse.”

Committee Action: S. 2837 was introduced on April 9, 2008, and passed the Senate by unanimous consent on June 24, 2008. On June 25, 2008, the bill was referred to the House Committee on Transportation and Infrastructure, which ordered the bill reported, as amended, by voice vote.

Cost to Taxpayers: A CBO score for S. 2837 is unavailable, but the only costs associated with a U.S. federal building renaming are those for sign and map changes, none of which significantly affect the federal budget.

Does the Bill Expand the Size and Scope of the Federal Government? No.

Does the Bill Contain Any New State-Government, Local-Government, or Private-Sector Mandates? No.

Does the Bill Comply with House Rules Regarding Earmarks/Limited Tax Benefits/Limited Tariff Benefits? A Committee Report citing compliance with rules regarding earmarks, limited tax benefits, or limited tariff benefits was not available. Such a report is not required because the bill is being considered under a suspension of the rules.

Constitutional Authority: Although no committee report citing constitutional authority is available, Article I, Section 8, Clause 7 of the Constitution grants Congress the authority to establish Post Offices and post roads.

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H.R. 4081—Prevent All Cigarette Trafficking (PACT) Act (Weiner, D-NY)

Order of Business: The bill is scheduled to be considered on Monday, September 8, 2008, under a motion to suspend the rules and pass the bill.

Summary: H.R. 4081 would establish new requirements and standards for tobacco distributors that ship cigarettes or smokeless tobacco directly to customers. The bill would require any such tobacco seller to comply with any applicable state, local, or tribal laws regarding the sale of tobacco and imposition of taxes. Under the bill tobacco sellers would also be required to clearly

label any package contain cigarettes or smokeless tobacco for sale. The bill would make it illegal for the U.S. Postal Service (U.S.P.S.) to ship any tobacco product for sale without a clear label. The bill would also make it illegal to ship a package containing more than ten pounds of tobacco product directly to a consumer. H.R. 4081 would allow businesses to ship tobacco to other businesses via the U.S.P.S.

H.R. 4081 would prohibit the delivery of tobacco products to consumers whose age has not been verified. The bill would require direct delivery tobacco sellers to establish a method for taking tobacco orders and shipping tobacco to customers so as to verify the name, age and address of the customer. The bill would require that the tobacco sellers keep information regarding their customers for four years and would grant the Department of Justice (DOJ) the authority to review the records.

The bill would require every direct delivery seller of tobacco products to register with the DOJ. The agency would be required to maintain a list of all registered direct sellers as well as a list of sellers that have failed to register. Sellers that have been placed on the list denoting that they have failed to register would be notified by the DOJ. A direct delivery tobacco seller would be allowed to appeal their inclusion on the list and the bill would require the DOJ to remove a seller from the non-compliance list if they have been incorrectly included.

H.R. 4081 would require direct delivery tobacco sellers to collect all federal, state, local, or tribal taxes applicable in the location where the customers receives their tobacco product. The bill would require that all applicable taxes be collected prior to the shipping of tobacco products.

Finally, H.R. 4081 would establish new penalties for failure to comply with the bill's provisions. Sellers would be subject to fines of up to 2% of their total tobacco sales. Violations of the bill's stipulations would also be considered felonies, and violators would be subject to fines of up to \$10,000 and/or imprisonment if they are repeatedly found to be in violation.

Additional Background: Under current law, tobacco sellers that ship products directly to consumers must submit monthly tax reports to state tax collection agencies in states where they do business. However, the findings listed in the bill indicate that there is concern that direct delivery tobacco sales have been used to get around paying local, state, and federal taxes that are associated with the sale of tobacco products. In addition, the bill states that "Hezbollah, Hamas, al Qaeda, and other terrorist organizations have profited from trafficking in illegal cigarettes or counterfeit cigarette tax stamps" and that "terrorist involvement in illicit cigarette trafficking will continue to grow because of the large profits such organizations can earn." According to a Government Accountability Office (GAO) report cited by the Senate Committee on the Judiciary, terrorists often raise funds "through illicit trade in myriad commodities, such as drugs, weapons, cigarettes, and systems, such as charities."

In an effort to require all direct delivery tobacco sellers to comply with local, state, and federal taxes, H.R. 4081 would establish new requirements and regulations regarding the shipping of tobacco products to consumers. As the rate of taxes on tobacco has grown over the past decade, the findings in the bill point out that the number of Internet vendors that sell tobacco products in the U.S. jumped from 40 in 2000 to over 500 in 2005. As the number of online vendors has

increased, traditional tobacco sellers have expressed their concern that their market is being under cut by illicit, overseas sellers. There have also been concerns raised that under age customers are utilizing direct delivery tobacco sellers because they are not old enough to purchase cigarettes and the current age reporting and verification requirements are not well documented.

According to Congressional Quarterly, United Parcel Service, Federal Express, and DHL have all implemented policies banning the shipment of tobacco products to consumers. For the time being, only the U.S.P.S. delivers tobacco products directly to consumers.

Committee Action: H.R 4081 was introduced on November 5, 2007, and referred to the Committee on the Judiciary, which held a mark-up and reported the bill, as amended, by voice vote on July 16, 2008.

Cost to Taxpayers: According to CBO, H.R. 5170 would authorize \$18 million in FY 2009 and \$124 million over the FY 2009 through FY 2013 period to fund increased regulatory and enforcement efforts.

Does the Bill Expand the Size and Scope of the Federal Government? No.

Does the Bill Contain Any New State-Government, Local-Government, or Private-Sector Mandates? Yes. According to CBO, "H.R. 4081 would impose new requirements related to certain sales of tobacco products by private and tribal entities and preempt certain state, local, and tribal laws. According to ATFE and industry sources, most of the entities affected by the requirements already perform many of the duties that would be imposed by this bill, and CBO estimates that the additional requirements would impose minimal costs."

Does the Bill Comply with House Rules Regarding Earmarks/Limited Tax Benefits/Limited Tariff Benefits? A committee report regarding compliance with House Rules regarding earmarks and limited tax benefits or limited tariff benefits was not available.

Constitutional Authority: A committee report citing constitutional authority was not available.

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**S. 2450—A bill to amend the Federal Rules of Evidence to address the waiver of the attorney-client privilege and the work product doctrine
(Leahy, D-VT)**

Order of Business: S. 2450 scheduled to be considered on Monday, September 8, 2008, under a motion to suspend the rules and pass the bill.

Summary: S. 2450 would amend the Federal Rules of Evidence with respect to the disclosure of a communication or information covered by the attorney-client privilege and work product protection.

The new rule includes the following provisions:

1. If a waiver is found, it applies only to the information disclosed, unless a broader waiver is made necessary by the holder's intentional and misleading use of privileged or protected communications or information.
2. An inadvertent disclosure does not operate as a waiver if the holder took reasonable steps to prevent such a disclosure and employed reasonably prompt measures to retrieve the mistakenly disclosed communications or information.
3. If there is a privileged or protected disclosure at the federal level, then state courts must honor the new rule in subsequent state proceedings. If there is a disclosure in a state proceeding, then admissibility in a subsequent federal proceeding is determined by the law that is most protective against a waiver.
4. A federal court order that a disclosure does not constitute a waiver is enforceable in any federal or state proceeding.
5. Parties in a federal proceeding can enter into a confidentiality agreement providing for mutual protection against waiver in that proceeding.

Additional Information: The following information was supplied by the House Judiciary Committee Republican staff:

Last year the US Judicial Conference submitted a proposed addition to the Rules of Evidence governing waivers of the attorney-client privilege or work product immunity. Rules governing evidentiary privilege must be approved by an act of Congress. S. 2450 incorporates verbatim the Judicial Conference recommendation. The bill is endorsed by a number of bar and judicial associations, along with business entities that litigate in federal court. There is no known opposition to the bill.

The Judicial Conference concluded that the current law on waivers of privilege and work product is largely responsible for the rising costs of discovery, especially discovery of electronic information. The reason is that if a protected document is produced, there is a risk that a court will find a subject matter waiver that will apply not only to the instant case and document but to other cases and documents as well. The fear of waiver also leads to extravagant claims of privilege.

The costs of discovery have spiked in recent years based on the proliferation of e-mail and other forms of electronic record-keeping. Litigants must constantly sift through a mountain of documents to ensure that privileged material is not inadvertently released.

While most documents produced during discovery have little value, attorneys must still conduct exhaustive reviews to prevent disclosures. The cost to litigants is staggering and the time consumed by courts to supervise these activities is excessive. The system is broken and must be fixed.

The Judicial Conference devoted great process to drafting their proposal. For more than a year, the Conference's Advisory Committee on Evidentiary Rules conducted hearings that featured testimony submitted by eminent judges, lawyers, and academics. The Advisory Committee later coordinated with the Conference of Chief Justices to ensure that the evolving draft addressed federalism concerns raised by the individual state court systems.

In April 2006, the Advisory Committee held a conference at Fordham Law School, at which a select group of academics and practitioners reviewed the draft. More revisions were developed that resulted in a revised rule that was published for public comment in August 2006. The Advisory Committee received more than 70 public comments and heard testimony from 20 witnesses at two hearings. In April 2007, further changes were made based on this process and the new Rule 502 was released. This draft was approved by the Committee on Rules of Practice and Procedure and the full Judicial Conference.

The House Judiciary Committee spent months informally reviewing S. 2450, a process that included intense discussions with representatives of the Judiciary and a Fordham Law School professor who assisted in the drafting of the Rule.

In sum, S. 2450 creates a predictable standard to govern waivers of privileged information. The legislation improves the efficiency of the discovery process while promoting accountability. It alters neither federal nor state law on whether the attorney client privilege or the work product doctrine protects specific information. The bill only modifies the consequences of an inadvertent disclosure once a privilege exists.

Committee Action: S. 2450 was introduced on December 11, 2007, and passed the Senate on February 27, 2008, by unanimous consent. The bill was referred to the House Committee on the Judiciary which took no official action.

Cost to Taxpayers: According to a CBO estimate, S. 2450 would have no significant effect on the federal budget. Enacting the legislation would not affect direct spending or revenues.

Does the Bill Expand the Size and Scope of the Federal Government? No.

Does the Bill Contain Any New State-Government, Local-Government, or Private-Sector Mandates? No.

Does the Bill Comply with House Rules Regarding Earmarks/Limited Tax Benefits/Limited Tariff Benefits? A House Committee Report does not exist.

Constitutional Authority: A House Committee Report does not exist.

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S. 2135—Child Soldiers Accountability Act of 2007 (*Durbin, D-IL*)

Order of Business: The bill is scheduled to be considered on Monday, September 8, 2008, under a motion to suspend the rules and pass the bill.

Summary: S. 2135 would make it a federal crime to knowingly recruit, enlist, or conscript a person under 15 years of age into an armed force or use a person under 15 years of age to participate in active hostilities. The bill would establish a penalty of up to 20 years

imprisonment for a violation of the law. If the recruitment of a child results in a death, the guilty party could be sentenced to up to life in prison.

The bill would establish a 10 year statute of limitations for prosecuting a person charged with recruiting a person under the age of 15. The bill also states that U.S. federal courts would have jurisdiction over offenses if the alleged perpetrator is a citizen, national, or alien admitted to the United States, the alleged perpetrator is located in the United States, or the offense occurs in the United States. Any offender who was not a U.S. citizen would be subject to deportation.

Additional Background: According to the Committee on the Judiciary, the U.N. has stated that involving persons under the age of 15 in direct combat violates the human rights of that child and should not be tolerated. There are currently 25 countries that have been identified for using children as soldiers, including Burma, Uganda, and Sudan. S. 2135 would make forcing a child to participate in combat a federal crime, subject to prosecution in the U.S.

Committee Action: S. 2135 was introduced on October 3, 2007, and referred to the Senate Committee on the Judiciary, which held a mark-up and reported the bill, as amended, on December 11, 2008. On December 19, 2007, the bill passed the Senate by unanimous consent, and was referred to the House Committee on the Judiciary. On February 4, 2008, the bill was referred to the Subcommittee on Crime, Terrorism, and Homeland Security, which held hearings and referred the bill back to the full committee on May 6, 2008. No further official action was taken.

Cost to Taxpayers: According to CBO, enacting S. 2135 would have “no significant cost to the federal government.”

Does the Bill Expand the Size and Scope of the Federal Government? No.

Does the Bill Contain Any New State-Government, Local-Government, or Private-Sector Mandates? No.

Does the Bill Comply with House Rules Regarding Earmarks/Limited Tax Benefits/Limited Tariff Benefits? A committee report regarding compliance with House Rules regarding earmarks and limited tax benefits or limited tariff benefits was not available.

Constitutional Authority: A committee report citing constitutional authority was not available.

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